



## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Parts 122 and 123**

**[EPA-HQ-OW-2022-0834; FRL-10123-02-OW]**

**RIN 2040-AG27**

### **NPDES Small MS4 Urbanized Area Clarification**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking direct final action to clarify its National Pollutant Discharge Elimination System (NPDES) Stormwater Phase II regulations due to recent changes made by the Census Bureau. The changes to EPA's regulations are limited to clarifying that the designation criteria for small municipal separate storm sewer systems (MS4s), which have been used since the promulgation of the regulations in 1999, will remain the same. These clarifications are necessary due to the Census Bureau's recent decision to discontinue its practice of publishing the location of "urbanized areas" along with the 2020 Census and future censuses. The clarification in this direct final rule replaces the term "urbanized area" in the Phase II regulations with the phrase "urban areas with a population of at least 50,000," which is the Census Bureau's longstanding definition of the term urbanized areas. This change will allow NPDES permitting authorities to use 2020 Census and future Census data in a manner that is consistent with existing longstanding regulatory practice. Because this clarification maintains the current scope of which entities are regulated as small MS4s, it is not expected to generate opposition, and EPA is publishing the clarification in the *Federal Register* as a direct final rule. As is EPA's practice for direct final rules, EPA is also publishing a parallel proposed rulemaking with the same changes included in this direct final rule if the Agency receives adverse comments.

**DATES:** This rule is effective on **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** without further notice, unless EPA receives adverse comment by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments on this rule must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If EPA receives adverse comment, the Agency will publish a timely withdrawal in the *Federal Register* informing the public that the rule will not take effect.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA-HQ-OW-2022-0834 to <https://www.regulations.gov/>. Follow the online instructions for submitting comments.

*Instructions:* All submissions received must include the Docket ID No. for this rule. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Written Comments” heading of the **Public Participation** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Heather Huddle, Water Permits Division (MC4203), Environmental Protection Agency, 1200 Pennsylvania Ave, NW, Washington DC 20004; telephone number: (202) 564-7932; email address: [huddle.heather@epa.gov](mailto:huddle.heather@epa.gov).

**SUPPLEMENTARY INFORMATION:** EPA is publishing this rule without a prior proposed rulemaking because the Agency views this as a noncontroversial action and anticipates no adverse comment. This action is limited to clarifying that EPA will retain the existing threshold for automatic designation of small MS4s for regulation under the Phase II stormwater permitting regulations. The threshold for automatic designation was used following the 2000 and 2010 Censuses and is based on the MS4 being in an

urbanized area of 50,000 or more people. This rule will maintain the threshold for automatic designations of small MS4s and will ensure that the designation of new MS4s will continue as originally required under the Phase II regulations.

In the “Proposed Rules” section of the *Federal Register*, EPA is publishing a separate document that will serve as the proposed rulemaking to clarify the NPDES small MS4 urbanized area definition. If EPA receives adverse comment, the Agency will publish a timely withdrawal in the *Federal Register* informing the public that this direct final rule will not take effect. EPA would address public comments as required as part of any subsequent final rule based on the proposed rulemaking.

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## **I. Public Participation**

### *A. Written Comments*

Submit your comments, identified by Docket ID No. EPA-HQ-OW-2022-0834, at <https://www.regulations.gov>. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to

make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). Please visit <https://www.epa.gov/dockets/commenting-epa-dockets> for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

### *B. Tips for Preparing Your Comments*

When submitting comments, remember to:

- Identify the rule by docket number and other identifying information (subject heading, *Federal Register* date, and page number).
- Follow directions - The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

## **II. General Information**

*A. Does This Action Apply to Me?*

Entities potentially regulated by this proposed action include:

Category	Examples of regulated entities	North American industry classification system (NAICS) code
Federal and state government	EPA or state NPDES stormwater permitting authorities	924110
Local governments	Operators of small municipal separate storm sewer systems	924110
State government	State departments of transportation	926120
Military	Federal military bases	928110
Public academic institutions	Publicly-administered colleges, universities, and professional schools	611310

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table includes the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not included could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in 40 CFR 122.28, 122.32, and 122.35, and the discussion in the preamble. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

*B. What Action is EPA Taking?*

EPA is taking direct final action to clarify its NPDES Phase II regulations due to

recent changes made by the Census Bureau. The changes to EPA's regulations are limited to clarifying that the designation criteria for small MS4s, which have been used since the promulgation of the regulations in 1999, will remain the same. The clarification will be made by replacing the term previously used by the Census Bureau, "urbanized area," with the phrase "urban areas with a population of at least 50,000," which is the Census Bureau's longstanding criteria for defining urbanized areas.

*C. What is the Agency's Authority for Taking This Action?*

The authority for this rule is the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., including sections 402 and 501.

*D. Background*

*1. Statutory and Regulatory Overview*

Stormwater discharges are subject to regulation under section 402(p) of the Clean Water Act (CWA). Under this provision, Congress required the following stormwater discharges initially to be subject to NPDES permitting requirements: stormwater discharges for which NPDES permits were issued prior to February 4, 1987; discharges "associated with industrial activity;" discharges from MS4s serving populations of 100,000 or more; and any stormwater discharge determined by EPA or a state to "contribute...to a violation of a water quality standard or to be a significant contributor of pollutants to waters of the United States." Congress further directed EPA to study other stormwater discharges and determine which discharges needed additional controls.

EPA developed the stormwater regulations under section 402(p) of the CWA in two phases, as directed by the statute. In the first phase, under section 402(p)(4) of the CWA, EPA promulgated regulations establishing application and other NPDES permit requirements for stormwater discharges from medium (serving populations of 100,000 to 250,000) and large (serving populations of 250,000 or more) MS4s, and stormwater discharges associated with industrial activity. EPA published the final Phase I rule on

November 16, 1990. 55 FR 47990. The Phase I rule, among other things, defined “municipal separate storm sewer” as publicly-owned conveyances or systems of conveyances that discharge to waters of the United States and are designed or used for collecting or conveying stormwater, are not combined sewers, and are not part of a publicly-owned treatment works. 40 CFR 122.26(b)(8).

In the second phase, section 402(p)(5) and (6) of the CWA required EPA to conduct a study to identify other stormwater discharges that needed further controls “to protect water quality,” report to Congress on the results of the study, and designate for regulation additional categories of stormwater discharges not regulated in Phase I in consultation with state and local officials. EPA promulgated the Phase II rule on December 8, 1999, designating discharges from certain small MS4s and from small construction sites (disturbing equal to or greater than one acre and less than five acres) and requiring NPDES permits for these discharges. 64 FR 68722 (December 8, 1999). A regulated small MS4 is generally defined as any MS4 that is not already covered by the Phase I program and that is located within the “urbanized area” boundary as determined by the latest U.S. Decennial Census. 40 CFR 122.32(a)(1) (“you are regulated if you operate a small MS4, including but not limited to systems operated by Federal, State, Tribal, and local governments, including State departments of transportation; and ... [y]our small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census.”).

Separate storm sewer systems such as those serving military bases, universities, large hospitals or prison complexes, and highways are also included in the definition of “small MS4.” 40 CFR 122.26(b)(16). In addition, the Phase II rule includes authority for EPA (or states authorized to administer the NPDES program) to require NPDES permits for currently unregulated stormwater discharges through a designation process. 40 CFR 122.26(a)(9)(i)(C) and (D). Other small MS4s located outside of an urbanized area may



be designated as a regulated small MS4 if the NPDES permitting authority determines that its discharges cause, or have the potential to cause, an adverse impact on water quality. 40 CFR 122.32(a)(2), 123.35(b)(3).

## *2. History of Using Urbanized Area Population Threshold for Small MS4*

### *Designations*

Since the 1950 Census, the Census Bureau has defined “urbanized area” as “one or more cities of 50,000 or more and all the nearby closely settled suburban territory, or urban fringes.”<sup>1</sup> This definition was in effect when EPA promulgated the Phase II Rule in 1999, and for the two censuses (2000 and 2010 Census) that have been published since then.<sup>2</sup> The Census Bureau’s use of this population threshold is significant for the Phase II permit program because where an MS4 is located within an area identified in the latest decennial Census as having a minimum population of 50,000 or more people (*i.e.*, in an “urbanized area”), the MS4 is automatically designated as regulated under the Phase II regulations.

The Phase II regulations have referred to the term “urbanized area” since the small MS4 program’s inception and this term has always been used synonymously with the 50,000 population threshold. When EPA initially promulgated the Phase II regulations, EPA explained that it was adopting the Census Bureau’s definition of “urbanized area” as one of the designation criteria for small MS4s and provided a definition of “urbanized area” that was identical to the Census Bureau’s definition. EPA stated in the preamble to the Phase II rule that “[u]nder the Bureau of the Census definition of ‘urbanized area,’ adopted by EPA for the purposes of this final rule, ‘an

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<sup>1</sup> 1950 Census of Population – Preliminary Counts, *Population of Urbanized Areas: April 1, 1950*, U.S. Department of Commerce, Bureau of the Census. Series PC-3 No. 9. February 1, 1951. See <https://www2.census.gov/library/publications/decennial/1950/pc-03/pc-3-09.pdf>.

<sup>2</sup> Urbanized areas have been defined by the Census Bureau as “urban areas that contain 50,000 or more people ...”. See 76 FR 53030, 53039 (August 24, 2011); and 67 FR 11663, 116667 (March 15, 2002).

urbanized area (UA) comprises a place and the adjacent densely settled surrounding territory that together have a minimum population of 50,000 people.” 64 FR 68722, 68751 (December 8, 1999).

EPA acknowledged that the Census Bureau could in the future change the criteria by which it defines “urbanized area,” which would then in turn affect the way in which new small MS4s would be automatically designated. It is for this reason that EPA explained in the Phase II rule preamble that new MS4 designations “will be governed by the Bureau of the Census’ definition of an urbanized area in effect for that year.” 64 FR 68722, 68751 (December 8, 1999). However, the Census Bureau has not changed the 50,000 population threshold since they adopted it 70 years ago. From the small MS4 permit program’s inception in 1999, therefore, EPA and state permitting authorities have always relied on the 50,000 population threshold to automatically designate and regulate MS4s. It is only now with the 2020 Census that the Census Bureau has announced its decision to no longer separately identify “urbanized areas.” 87 FR 16706, 16707 (March 24, 2022).

### **III. Rationale and Summary of Direct Final Rule**

#### *A. Why a Change to the Phase II Regulations is Appropriate*

This section explains how the Census Bureau’s elimination of the term “urbanized area” relates to which MS4s are automatically designated for regulation under the Phase II regulations based on the 2020 Census and subsequent censuses.

The Census Bureau’s elimination of the term “urbanized area” does not impact small MS4s that are already regulated under the Phase II rule. For those small MS4s already regulated because of their location in an “urbanized area” designated by a previous census, the Phase II regulatory history indicates that a subsequent Census Bureau change to the designation criteria for urbanized areas does not affect their regulatory status. EPA stated in the Phase II rule preamble that even if the Census Bureau

were to change its “urbanized area” definition, “a small MS4 that is automatically designated into the NPDES program for storm water under an urbanized area calculation for any given Census year will remain regulated regardless of the results of subsequent urbanized area calculations.” 64 FR 68722, 68751 (December 8, 1999).<sup>3</sup> EPA’s regulations, therefore, require continued regulation of previously designated small MS4s despite the Census Bureau’s change. EPA notes that this does not prevent the operator of a qualifying MS4 so designated from requesting consideration of an NPDES waiver under 40 CFR 122.32(c).

The existing Phase II regulatory text does not explicitly instruct EPA how to treat the designation of new MS4s due to the fact that the Census Bureau’s decennial censuses will no longer separately identify “urbanized areas.” For the 1999 Phase II rule, EPA always intended the universe of regulated small MS4s to grow in a manner commensurate with the growth of “urbanized areas” as identified by the latest decennial census. However, while the Phase II rule preamble explained that new MS4s would be designated in accordance with the latest census definition of “urbanized area,” it did not provide instruction on what to do if a decennial census no longer identifies the location of such urbanized areas. EPA is taking this action to address the Census Bureau’s changes and clarify for permitting authorities and the public that it intends the scope of which small MS4s are regulated to not change, and that it will rely on what that term has always meant rather than having the regulations reference an out-of-date term.

#### *B. Rationale for Clarification to Phase II Regulations*

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<sup>3</sup> EPA’s statement in its entirety: “Based on historical trends, EPA expects that any area determined by the Bureau of the Census to be included within an urbanized area as of the 1990 Census will not later be excluded from the urbanized area as of the 2000 Census. However, it is important to note that even if this situation were to occur, for example, due to a possible change in the Bureau of the Census’ urbanized area definition, a small MS4 that is automatically designated into the NPDES program for storm water under an urbanized area calculation for any given Census year will remain regulated regardless of the results of subsequent urbanized area calculations.”

The most straightforward way for EPA to clarify its regulations in a manner that maintains program continuity and consistency is to replace the reference to “urbanized area” in the Phase II regulations with text that replicates the 50,000 population threshold on which the Census Bureau and NPDES authorities have historically relied. As discussed in Section II.D.2 of this preamble, from the inception of the small MS4 permitting program, the 50,000 population threshold has been used synonymously with the term “urbanized area” by both the Census Bureau and NPDES permitting authorities. Replacing the term “urbanized area” with text that incorporates this same 50,000 population threshold will mean that the existing method for designating small MS4s following the latest decennial census will be identical to how it has always been implemented. This change will thus ensure that there is no disruption in the designation of new MS4s and that the program is implemented in a historically consistent manner.

Substituting the obsolete references to “urbanized areas” with the 50,000 population threshold will also ensure that new Census 2020 mapping data and subsequent census mapping data can be used seamlessly to identify newly regulated MS4s. Prior to the recent Census Bureau changes, the location of any “urbanized areas” would have been automatically identified with any decennial census. Moving forward, however, each decennial census will be limited to identifying “urban areas” without identifying “urbanized areas” within those areas. Even though “urbanized area” locations will no longer be provided as part of the 2020 Census and future censuses, the Census Bureau will continue to provide population data for each identified urban area.<sup>4</sup> The availability of these population data will enable EPA and state permitting authorities to easily

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<sup>4</sup> In its *2020 Urban Areas Frequent Asked Questions*, the Census Bureau provided the following answer in response to the question “Is it true that the Census Bureau is no longer defining urbanized areas?”: “No. The Census Bureau will no longer identify an individual urban area as either an urbanized area or an urban cluster. We will refer to all areas as “urban areas” regardless of population size. *We will publish population and housing counts for each urban area when we announce results of the 2020 Census urban area delineation. Data users and program will be able to use those counts and subsequent American Community Survey estimates to categorize urban areas according to population size.*” (emphasis added) See [https://www2.census.gov/geo/pdfs/reference/ua/2020\\_Urban\\_Areas\\_FAQs.pdf](https://www2.census.gov/geo/pdfs/reference/ua/2020_Urban_Areas_FAQs.pdf).

identify which urban areas have populations of 50,000 or more people and, therefore, to provide the necessary information to designate new MS4s.

*C. Summary of Changes to Phase II Regulations*

The changes to the Phase II regulations are limited to replacing the existing references to “urbanized area” as a criterion for designating small MS4s for regulation with text that incorporates the underlying population threshold associated with that term, or more specifically “urban areas with a population of 50,000 or more people.” This change is made in the following specific sections:

- 40 CFR 122.28(a)(1)(vi): This provision describes the requirement that general permits can only be used to provide coverage to discharges in a specific geographic area. The change here is to the existing list of examples of geographic or political boundary areas that meet this requirement, which currently refer to “urbanized areas” as one of the examples. The reference to “urbanized areas” here will be replaced by the described 50,000 population threshold.
- 40 CFR 122.32(a)(1): This provision currently specifies that small MS4s located in “urbanized areas” are regulated as small MS4s. The reference to “urbanized areas” here will be replaced by the described 50,000 population threshold.
- 40 CFR 122.32(d): This provision indicates that small MS4s regulated under 40 CFR 122.32(a)(1) for “urbanized areas” may be eligible for an NPDES waiver if they meet the applicable criteria. The reference to “urbanized areas” here will be substituted with a reference to the revised text in 40 CFR 122.32(a)(1).
- 40 CFR 122.33(b)(3): This provision references the ability of regulated small MS4s located in the same “urbanized area” as a medium or large MS4 to be included as a limited co-permittee in the same NPDES permit as the medium or large MS4. The reference to “urbanized area” will be modified to read “urban area” instead.

- 40 CFR 123.35(b)(1)(ii): This provision includes a reference to an “urbanized area” in the context of regulatory guidance on criteria that state permitting authorities may use to designate other small MS4s for regulation, including “contiguity to an urbanized area.” The reference to “urbanized area” will be replaced by the described 50,000 population threshold.
- 40 CFR 123.35(b)(2): This provision includes a reference to an “urbanized area” in the context of applying state permitting authority criteria for designating additional small MS4s for regulation, including MS4s located outside of an “urbanized area” serving a jurisdiction with a population density of at least 1,000 people per square mile and a population of at least 10,000. The reference to “urbanized area” will be replaced by the described 50,000 population threshold.
- 40 CFR 123.35(d)(1): This provision indicates that small MS4s regulated under 40 CFR 122.32(a)(1) for “urbanized areas” may be eligible for an NPDES waiver if they meet the applicable criteria. The reference to “urbanized areas” here will be substituted with the described 50,000 population threshold.

#### *D. Costs of This Action*

The regulatory clarifications in this rule ensure that the population basis for regulating small MS4s will remain the same. As a result, these clarifications will not result in increased costs to small MS4 permittees or to state and EPA permitting programs, nor will it regulate additional MS4s beyond what was required by the 1999 Phase II regulations.

#### *E. Direct Final Rule Implementation and Technical Assistance*

The changes made by this direct final rule will become effective on **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, assuming no adverse comments are received. Because this rule effectively

retains the population basis used since the promulgation of the Phase II regulations to designate new small MS4s following a decennial census, EPA expects permitting authorities to be able to implement the revisions in the rule immediately.

EPA plans to continue to provide technical assistance to permitting authorities in a number of different ways to help with the implementation of the MS4 program following publication of the new census data. The following is a summary of EPA's planned technical assistance activities:

- *Publish new MS4 mapping information:* Following the publication of the 2020 Census urban area information, EPA will be able to determine which urban areas have a population of 50,000 or more people and thereby identify which areas meet the revised rule's criteria for small MS4s. EPA plans to use the 2020 Census data to publish mapping information that will show where urban areas with a population of 50,000 or more people are located in the United States and where these areas are located with respect to municipal boundaries. This information will enable permitting authorities to determine which jurisdictions are likely operating MS4s within urban areas that meet the 50,000 population threshold. EPA also plans to provide mapping information that compares the 2010 Census and 2020 Census location of these urban areas. Permitting authorities will be able to use this information to pinpoint the location of new MS4s and compare how the urban area boundaries have changed since the 2010 Census for existing MS4s.
- *Provide permitting authorities with a draft list of new MS4s:* To assist NPDES permitting authorities, EPA plans to use the mapping information described under the previous bullet point to preliminarily identify new MS4s that are located within the urban areas meeting the population threshold. EPA provided a similar list of new MS4s following the 2010 Census. Permitting authorities are

then free to evaluate the MS4s identified on this list to determine if they are accurate and whether any changes are needed.

- *Provide guidance materials:* EPA will provide additional guidance related to the process of permitting newly designated MS4s that NPDES authorities may choose to use. EPA provided similar guidance following the publication of the 2010 Census, which included tips on the suggested steps to follow from initial contact with the new MS4 operators to including them in the applicable NPDES permit. EPA also provided a letter template that permitting authorities could use to inform new MS4 operators of their designation and what to expect from the permitting process moving forward. The Agency plans to update these materials for the 2020 Census, and to explore what additional technical assistance may be needed. EPA will engage with its Federal and state permitting authority partners to determine which type of assistance may be the most beneficial.
- *Rescind interim guidance:* Earlier this year, EPA published on its website *Interim Guidance on Census Elimination of “Urbanized Areas”* (see <https://www.epa.gov/npdes/interim-guidance-census-elimination-urbanized-area-definition>). The guidance was intended to provide interim recommendations to permitting authorities regarding the implementation of their small MS4 permitting programs following the finalization of the Census Bureau’s designation criteria changes while EPA evaluated how best to clarify its regulations. Assuming this rule becomes effective on **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the interim guidance will no longer be necessary. Upon the effective date of this rule, EPA will rescind the interim guidance.

## **VI. Statutory and Executive Orders Reviews**



Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

*B. Paperwork Reduction Act (PRA)*

This action does not impose an information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2040-0004. This rule contains no new requirements for reporting and recordkeeping.

*C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, EPA concludes that the impact of concern for this rule is any significant adverse economic impact on small entities and that the Agency is certifying that this rule will not have a significant economic impact on a substantial number of small entities because the rule has no net burden on the small entities subject to the rule. EPA is limiting its changes to substituting use of the term “urbanized area” in the four subsections of the Phase II regulations with the underlying population criteria that has been used synonymously with this term since the 1999 promulgation of the regulations. See discussion in Sections III.B and C of this preamble. Although making this clarification is important to ensure program continuity and consistency, EPA views this change as akin to a clerical correction to remove an obsolete term and ensure that program applicability remains unchanged. The

Agency has therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments, or the private sector.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe

may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act (NTTAA)*

This rule does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or indigenous peoples) and low-income populations.

The EPA believes that the human health and environmental conditions that exist prior to this action do not result in disproportionate and adverse effects on people of color, low-income populations, and/or indigenous peoples. This action makes a technical clarification to a previously promulgated regulatory action, and will not change the human health and environmental conditions that currently exist with the implementation of the Phase II regulations.

The EPA believes that this action is not likely to result in new disproportionate and adverse effects on people of color, low-income populations and/or indigenous peoples. This regulatory action is a technical clarification to a previously promulgated regulatory action and does not have any disproportionate and adverse impact on people of color, low-income populations and/or indigenous peoples.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

**List of Subjects**

**40 CFR Part 122**

Environmental protection, Stormwater, Water pollution.

**40 CFR Part 123**

Environmental protection, Stormwater, Water pollution.

Michael S. Regan,  
Administrator.

For the reasons stated in the preamble, EPA amends 40 CFR parts 122 and 123 as set forth below:

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Amend § 122.28 by revising paragraph (a)(1)(vi) to read as follows:

**§ 122.28 General permits (applicable to State NPDES programs, see § 123.25).**

(a) \* \* \*

(1) \* \* \*

(vi) Urban areas with a population of 50,000 or more people as determined by the latest Decennial Census by the Bureau of the Census; or

\* \* \* \* \*

3. Amend § 122.32 by revising paragraph (a)(1) and paragraph (d) introductory text to read as follows:

**§ 122.32 As an operator of a small MS4, am I regulated under the NPDES storm water program?**

(a) \* \* \*

(1) Your small MS4 is located in an urban area with a population of 50,000 or more people as determined by the latest Decennial Census by the Bureau of the Census.

(If your small MS4 is not located entirely within an urban area with a population of 50,000 or more people, only the portion that is within this urban area is regulated); or

\* \* \* \* \*

(d) The NPDES permitting authority may waive permit coverage if your MS4 serves a population of less than 1,000 within the urban area identified in paragraph (a)(1) of this section and you meet the following criteria:

\* \* \* \* \*

4. Amend § 122.33 by revising paragraph (b)(3) to read as follows:

**§ 122.33 Requirements for obtaining permit coverage for regulated small MS4s.**

\* \* \* \* \*

(b) \* \* \*

(3) *Co-permittee alternative.* If the regulated small MS4 is in the same urban area as a medium or large MS4 with an NPDES storm water permit and that other MS4 is willing to have the small MS4 operator participate in its storm water program, the parties may jointly seek a modification of the other MS4 permit to include the small MS4 operator as a limited co-permittee. As a limited co-permittee, the small MS4 operator will be responsible for compliance with the permit's conditions applicable to its jurisdiction. If the small MS4 operator chooses this option it must comply with the permit application requirements of § 122.26, rather than the requirements of § 122.33(b)(2)(i). The small MS4 operator does not need to comply with the specific application requirements of § 122.26(d)(1)(iii) and (iv) and (d)(2)(iii) (discharge characterization). The small MS4 operator may satisfy the requirements in § 122.26 (d)(1)(v) and (d)(2)(iv) (identification of a management program) by referring to the other MS4's storm water management program.

\* \* \* \* \*

**PART 123—STATE PROGRAM REQUIREMENTS**

5. The authority citation for part 123 continues to read as follows:

**Authority:** Clean Water Act, 33 U.S.C. 1251 *et seq.*

6. Amend § 123.35 by revising paragraph (b)(1)(ii), (b)(2), and (d)(1) introductory text to read as follows:

**§ 123.35 As the NPDES Permitting Authority for regulated small MS4s, what is my role?**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(ii) Guidance: For determining other significant water quality impacts, EPA recommends a balanced consideration of the following designation criteria on a watershed or other local basis: discharge to sensitive waters, high growth or growth potential, high population density, contiguity to an urban area with a population of 50,000 people or more as determined by the latest Decennial Census by the Bureau of the Census, significant contributor of pollutants to waters of the United States, and ineffective protection of water quality by other programs;

(2) Apply such criteria, at a minimum, to any small MS4 located outside of an urban area with a population of 50,000 people or more as determined by the latest Decennial Census by the Bureau of the Census serving a jurisdiction with a population density of at least 1,000 people per square mile and a population of at least 10,000;

\* \* \* \* \*

(d) \* \* \*

(1) You may waive permit coverage for each small MS4s in jurisdictions with a population under 1,000 within the urban area with a population of 50,000 people or more as determined by the latest Decennial Census by the Bureau of the Census where all the following criteria have been met:

\* \* \* \* \*